STATE OF MICHIGAN

COURT OF APPEALS

STEVEN M. WHITE and GAIL A. WHITE, Plaintiffs-Appellees, v STATE FARM FIRE AND CASUALTY COMPANY, Defendant-Appellant.	FOR PUBLICATION July 28, 2011 No. 298083 Oakland Circuit Court LC No. 09-099766-CK Advance Sheets Version

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I concur with Judge METER's opinion in all respects. I write separately to emphasize the practical dislocations that would arise from adoption of defendant's argument. Defendant essentially asks that we require the party-appointed appraisers to possess the same level of neutrality as the umpire. Indeed, virtually all the cases cited by defendant address the requirements for judges and magistrates, which is, of course, an absolute standard of impartiality. I agree with the majority that defendant's position is inconsistent with the Legislature's decision to use statutory language that clearly distinguishes between the role of the party-selected appraisers and the umpire. The umpire, upon whom the decision ultimately rests, must be "impartial" while the appraisers need not be. Instead, they must be "independent," i.e. not under the actual control of the parties.

Appraisal is a practical mechanism to resolve disputes without the necessity for lawsuits and the appraiser acts as an expert for the party that hires the appraiser. While an appraiser brings specialized knowledge to the process, all parties also expect that each appraiser will articulate and generally support his or her client's position concerning the claim. In an appraisal, the two party-selected appraisers, through argument and compromise, attempt to reach a resolution of the claim that they both believe is reasonable. If that cannot be accomplished, then the umpire either induces them to bridge their differences or makes the decision himself with one of the two party-selected appraisers providing the second vote. Despite defendant's assertion of a due process claim, at no point does defendant assert that this method yields unfair results or that it is impracticable.

Defendant suggests that payment of an appraiser by contingent fee is corrupting, but that payment by hourly fee is not. This is a distinction without a difference. The appraiser appointed

by defendant in this case makes his living acting on behalf of insurance companies and it is either naive or disingenuous to suggest that he will continue to be hired by them if they do not feel that the results he obtains are in their interest. Defendant's appraiser testified that over the past three years alone, defendant has appointed him as its appraiser on approximately 40 claims and has paid him $114,512.03 in appraiser fees. In the 14 recent claims where this appraiser and a public adjustor, presumably working under a 10 percent contingency fee agreement, served as party appraisers, his hourly fees exceeded the policyholders' appraisers' fees by 42 percent. To maintain that he does not have a pecuniary interest in seeking a favorable outcome for defendant and the other insurance companies that retain him is absurd. This is not an attack on this gentleman's probity, because he is, in fact, paid to act as an advocate with specialized knowledge, as is plaintiff's appraiser. The role that an appraiser plays, the fact that he or she is paid by one side to the dispute, and the fact that he or she exclusively (or nearly exclusively) works for either insurers or insureds, is the source of the lack of impartiality, not whether the appraiser is compensated at an hourly rate or by a contingent fee. An appraiser's livelihood depends on maintaining a reputation among insureds or insurers that their respective positions will be well-articulated and supported and that the appraiser will obtain an acceptable, if not pleasing, outcome for the side that retained the appraiser. If we were to adopt defendant's extra-statutory requirements, virtually all party-appointed appraisers would have to be disqualified and the entire appraisal mechanism, which has fairly served all sides for decades, would come to a screeching halt. The result would be more unnecessary litigation.

Lastly, the majority opinion does not address plaintiffs' argument that defendant's policy, by requiring "disinterested" rather than "independent" appraisers, is inconsistent with state law, as it has existed since 1990, and constitutes fraud. Given our conclusion in this case, I agree that it was not necessary to do so and I make no judgment regarding defendant's intent in its continued use of the outdated term. However, it must be noted that defendant's response to this argument is wholly devoid of merit. Defendant suggests that if its policy is out of compliance with the statute, indeed, even if it is purposefully so, it is of no consequence because its policy also states:

> **10. Conformity to State Law.**
>
> When a policy provision is in conflict with the applicable law of the state in which this policy is issued, the law of the State will apply.

This statement, which is itself required to be included by state law, is a sword provided to insureds should they discover that the policy issued to them does not comply with state law. Contrary to defendant's suggestion, it is not intended as a shield for insurers that issue policies inconsistent with state law. Insurers have a duty to comply with state law. The provision just cited is intended to require that compliance, not to facilitate noncompliance.

/s/ Douglas B. Shapiro